No. 685.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1918.

JACOB FROHWERK, PLAINTIFF IN ERROR,

VS.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

## PETITION FOR A REHEARING.

FRANS E. LINDQUIST,
*Attorney for Plaintiff in Error.*

GEO. N. ELLIOTT,
*Of Counsel.*

## INDEX.

**Citations.**

No. 685.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1918.

JACOB FROHWERK, PLAINTIFF IN ERROR,

VS.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF MISSOURI.

## PETITION FOR A REHEARING.

*To the Honorable EDGAR D. WHITE, Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:*

Comes now JACOB FROHWERK, the plaintiff in error in the above entitled cause, by FRANS E. LINDQUIST, a duly admitted, licensed and practicing attorney and counselor of the Supreme Court of the United States, and respectfully prays this Honorable Court to grant him a rehearing in this cause; and to also

sustain the motion for leave to file a petition for a writ of mandamus, requiring the Honorable FRANK A. YOUMANS, acting judge of the United States District Court for the Western Division of the Western District of Missouri to prepare, settle, seal and file, as of the 20th day of August, 1918, a legal and proper bill of exceptions, showing the evidence introduced, objections and exceptions made and all rulings made by the said District Court, in accordance with the prayer contained in the petition for a writ of mandamus heretofore filed, to the end that the judgment of the said District Court may be reversed, and said cause remanded for a new trial, for the reasons following, to-wit:

## FIRST.

**The motion for leave to file a petition for a writ of mandamus should have been sustained.**

Mr. Justice HOLMES, speaking for this Honorable Court said:

> "Owing to unfortunate differences no bill of exceptions is before us. Frohwerk applied to this court for leave to file a petition for a writ of mandamus requiring the judge to sign a proper bill of exceptions, but a case was not stated that would warrant the issuing of the writ and leave was denied. *United States ex rel. Frohwerk* v. *Youmans*, December 16, 1918. The absence of a bill of exceptions and the suggestions in the application for mandamus have caused us to consider the case with more anxiety than if presented only the constitutional question which was the theme of the principal argument."

This Honorable Court in the early case of *Ex Parte Crane* (1831), 5 Pet. 190, laid down this sound rule:

> "THE SUPREME COURT HAS POWER TO ISSUE A MANDAMUS DIRECTED TO A CIRCUIT COURT OF THE UNITED STATES, COMMANDING THE COURT TO SIGN A BILL OF EXCEPTIONS, IN A CASE TRIED BEFORE SUCH COURT."

In Chateaugay Ore and Iron Company, Petitioner (188), 128 U. S. 544, the following order was made by this Honorable Court:

> "THE WRIT WILL ISSUE IN THE TERMS OF THE PRAYER OF THE PETITION, COMMANDING THE JUDGE TO SETTLE THE BILL OF EXCEPTIONS TENDERED BY THE DEFENDANT, ACCORDING TO THE TRUTH OF THE MATTERS WHICH TOOK PLACE BEFORE HIM ON THE TRIAL OF THE AFORESAID ACTION, AND, WHEN SO SETTLED, TO SIGN IT AS OF THE 10TH DAY OF APRIL, 1888, THAT BEING THE DAY WHEN THE PROPOSED BILL AND PROPOSED AMENDMENTS WERE SUBMITTED TO HIM FOR SETTLEMENT."

**Why we have no Bill of Exceptions.**

July 1st, 1918, Judge Youmans made an order granting the defendant leave to file a bill of exceptions, on or before September 1st, 1918.

Mr. Shewalter and the defendant thereupon obtained from the writer a copy of the Rules of this Honorable Court. Section 4 provides:

> "Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which the exceptions are reserved, ***and such evidence as is embraced therein shall be set forth in a condensed and narrative form***, save as a proper understanding of the questions presented may require that parts of it be set forth otherwise."

August 7th, 1918, Mr. Shewalter, as attorney for the defendant, transmitted to Senator Francis M. Wilson, United States Attorney, for his approval, a bill of exceptions, together with a letter containing the following:

> "I hand you herewith the defendant's bill of exceptions in the case of United States v. Frohwerk. It is made out in exact accordance with Rule Four of the Supreme Court. This rule is wise, and the object of it is evidently to relieve the court of a long bill of exceptions, and to embrace only the substance of the testimony, and also to prevent oppression of defendants."

We have been informed that Senator Wilson positively refused to consider the bill of exceptions at all, for the reason that same did not contain a stenographic report of the proceedings.

August 16, 1918, Judge Youmans wrote Mr. Shewalter a certain letter, in words and figures as follows, to-wit:

"Fort Smith, Ark., Aug. 16, 1918.

J. D. Shewalter, Esq.,
Independence, Mo.

Dear Sir:

Yesterday I received from the clerk the assignment of errors filed by you for the defendant in the case of the United States against Frohwerk.

The thirteenth assignment is as follows:

'The court committed error in refusing a peremptory instruction to find defendant not guilty on the first count; there is no evidence of a conspiracy; and the overt act is not admissible to prove the agreement but only of the commission of the act carrying out the agreement where there is evidence going to prove the last.

Defendant should have been acquitted on the second and subsequent counts as there was no proof whatever that he did prepare, print, publish and circulate said articles or paper; but the evidence is all to the effect that he had nothing to do with printing, publishing and circulating and only prepared some of the articles subject to the supervision of his employer.'

For the proper consideration of that assignment it is necessary that there should be incorporated in the bill of exceptions all of the testimony in the case in full. The bill of exceptions tendered by you contains a mere fragment of the testimony. *The introduction of evidence covered a period of two and one-half days.* You have so reduced the testimony in your proposed bill of exceptions that it covers less than twelve pages of manuscript. You have given about five of these pages to the testimony for the government and the remaining seven you have devoted to the testimony for the defendant. Three pages of the seven are taken up with testimony of witnesses on reputation.

The articles which formed the basis of the charges in the indictment are referred to in the proposed bill of exceptions as follows:

'Articles as set forth in the different counts of the indictment were offered in evidence and read to the jury.'

The bill of exceptions which you have tendered is so lacking in essential requirements; it is so defective that it is not even susceptible of amendment.

You have needlessly incorporated in the bill of exceptions the plea in abatement, demurrer to the indictment, motion for continuance and other motions, all of which are already of record.

'The office of a bill of exceptions is to bring into the record of a case those material matters which otherwise would not appear.'

~~You have inserted, as if requested by you, an instruction on neutrality and another on the sufficiency of the evidence that you did not ask.~~

You have magnified non-essentials and have reduced essentials to the vanishing point.

*I am compelled to refuse to sign the bill of exceptions which you have tendered.*

I will prepare and send to the clerk a bill of exceptions with directions to file same when requested so to do either by you or Mr. Frohwerk. *In that bill of exceptions I will state that on the trial of the case the government introduced testimony tending to prove all of the allegations in counts* 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12 *and* 13.

Very respectfully,

F. A. YOUMANS."

The evidence contained in the proposed bill of exceptions, so prepared by Mr. Shewalter, and refused by the United States Attorney and Judge Youmans, are ab-

stracted on pages 8 to 11 inclusive of the petition for a writ of mandamus, which is referred to and made a part of this petition for a rehearing.

August 20, 1918, Judge Youmans, in lieu of said proposed bill of exceptions, prepared, signed and sealed another pretended bill of exceptions, for the alleged reasons, to-wit: "For as much as the matters herein set out do not appear of record in this cause, and because the bill of exceptions prepared and tendered by the defendant is incorrect, incomplete and not susceptible of amendment, this bill of exceptions is prepared, signed and sealed by the court and upon the request of defendant is made a part of the record herein," abstracted on page 12 of said petition for writ of mandamus, which is referred to and made a part of this petition for a rehearing, but that in said bill of exceptions, so signed by said Judge Youmans, the only reference to the actual trial and evidence introduced are the following, to-wit:

"Thereupon a jury was called and duly sworn and empaneled to try the case of the United States against Jacob Frohwerk.

ON THE TRIAL OF SAID CAUSE THE UNITED STATES INTRODUCED TESTIMONY TENDING TO PROVE ALL OF THE ALLEGATIONS IN COUNTS 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12 and 13 OF THE INDICTMENT," abstracted on page 21 of said petition for a writ of mandamus, which is referred to and made a part of the petition for a rehearing.

September 14, 1918, Judge Youmans sent to John B. Warner, Clerk of said United States District Court, the following letter:

> "At the request of Mr. Shewalter I am returning the bill of exceptions tendered by him in the case of the United States v. Jacob Frohwerk. Attached to the bill of exceptions is a letter from Mr. Shewalter to Mr. Wilson, the United States Attorney.
>
> Mr. Shewalter, in his letter, requests that this bill of exceptions be placed in your custody and that it be retained by you. I think that is a proper disposition to be made of it and request that you so retain it, and that you allow Mr. Shewalter and the defendant, Mr. Frohwerk, to make such examination of it as they or either of them may see fit.
>
> I return you also herewith the instructions which you sent me at my request. I am sending copy of this letter to Mr. Shewalter for his information. Yours truly, F. A. YOUMANS."

which letter is abstracted on page 15 of the petition for a writ of mandamus, is referred to and made a part of this petition for a rehearing.

Judge Youmans states that "the introduction of evidence covered a period of two and one-half days." Mr. Shewalter, following Rule 4 of this Honorable Court, prepared a bill of exceptions, containing the evidence of the witnesses, J. A. Calvin, W. N. Grant, C. H. Galaskowsky, Frank Cramer, Arthur Bagley and Otto Schmitz, who testified on behalf of the Government. He also showed that "Articles, as set forth in the different counts of the indictment, were offered in evidence, and read to the jury." He also showed that at the close of

the Government's evidence, the defendant, through counsel, "asked a peremptory instruction to find the defendant not guilty, which the court refused to give, and to which action of the court, in refusing so to declare the law, the defendant then and there excepted" (Print 87).

This demurrer did raise the question of the sufficiency of the evidence to justify the submission of the case to the jury. This point was raised in the thirteenth assignment of errors, with a view of having Your Honors review the action of Judge YOUMANS, with a view of having Your Honors declare, as a matter of law, that such evidence is wholly insufficient to support a verdict of guilty on either count of the indictment.

The district attorney refused to consider anything but a full stenographic report of the entire proceedings. Judge YOUMANS, however, held that the proposed bill of exceptions was so incorrect, incomplete and not susceptible of amendment, that he proceeded to prepare, settle and seal another bill of exceptions, in which he did not refer to the name of a single witness, or what the evidence consisted of, but only the following, to-wit:

> "ON THE TRIAL OF SAID CAUSE THE UNITED STATES INTRODUCED TESTIMONY TENDING TO PROVE ALL OF THE ALLEGATIONS IN COUNTS 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12 and 13 OF THE INDICTMENT."

With all due respect for Judge YOUMANS, we most respectfully submit that his own statement convicts him of having erred in denying and overruling the demurrer to the evidence, in that he does not even state that the Government introduced evidence to prove all of

the allegations contained in the various counts of the indictment, but only that they tended to prove. If such a statement constitutes a bill of exceptions, we have heretofore gone to a useless lot of trouble in getting up bills of exceptions.

We did not ask that Judge YOUMANS should be compelled, by a writ of mandamus, to settle, seal and file *any special bill of exceptions.* We are well aware that to do so would deprive the trial judge of the power of determining what evidence was in fact introduced. We did ask, however, that an alternative writ of mandamus would issue, directed to the said judge, ordering and directing him to prepare, settle, seal and file, as of the 20th day of August, 1918, and within the time prescribed by said order of the District Court, *a legal and proper bill of exceptions, showing the evidence introduced, objections and exceptions and all rulings made by said court.*

In denying the motion for leave to file a petition for a writ of mandamus, Your Honors did not assign any reasons. None are given in the opinion. It must, however, have been denied on the theory that the judge had already signed a bill of exceptions. If a trial judge may make up a bill of exceptions, which would not be worth the paper upon which it was written, and thus comply with the law, when the sufficiency of the evidence is challenged by a demurrer, he can thereby deprive this court of the power of reversing any case for insufficiency of the evidence. We say that the action of Judge YOUMANS was illegal and arbitrary. We further assert, without any fear of contradiction, that the bill of excep-

tions as signed by Judge YOUMANS, even though it had been filed and abstracted in the transcript, *would have availed us nothing.* Surely Your Honors could not have passed upon the sufficiency of the evidence, when not even the name of a single witness was mentioned in the bill of exceptions. Judge YOUMANS did not file the bill of exceptions, as he is required to do, but left it to Mr. Shewalter and the defendant to determine whether or not it should be filed.

We most respectfully submit that it would be a travesty of justice to affirm the judgment of the District Court, and send this defendant to the penitentiary, because Judge YOUMANS and his attorney (Mr. Shewalter) could not agree upon a bill of exceptions. This defendant may be bound by the action of Mr. Shewalter, but no legal reasons could be assigned why he should be made to suffer for the acts of commission or omission of Judge YOUMANS. So carefully have the legislatures protected the individual, in civil actions, that nearly every state in the Union has enacted a law, in substance, "No person shall be held to answer for the debt, default or miscarriage of another, unless it be in writing, and subscribed by the party or his agent thereto authorized in writing." If the civil rights of the individual are so protected, upon what theory could it be contended that this defendant should answer for the default and miscarriage of Judge YOUMANS, in a criminal case?

We respectfully submit that the motion for leave to file the petition for a writ of mandamus should be reconsidered and granted, and that a writ of mandamus should issue, as prayed for.

SECOND.

**Is the first count of the indictment duplicitous?**

Your Honors say that

> "Countenance we believe has been given by some courts to the notion that a single count in an indictment for conspiring to commit two offenses is bad for duplicity. This court has given it none. *Buckeye Powder Co.* v. *E. I. Dupont de Nemours Powder Co.*, 248 U. S. 55, 60, 61; *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531, 548. The conspiracy is the crime, and that is one, however diverse its object."

No one would contend that to charge a person with murder and arson, in the same count of the indictment, would not constitute such a count duplicitous. The Sixth Amendment to the Constitution of the United States guarantees to the accused he right to be informed of the nature and cause of accusation against him. If he cannot be charged with two substantive crimes in the same count, could there be any valid reason why he should not be entitled to the same protection, when charged with conspiracy to violate the law?

The first count charges

> "That said CARL GLEESER and JACOB FROHWERK, * * * did, at Kansas City in Jackson County, Missouri, and within the jurisdiction of this court unlawfully, wilfully and feloniously conspire, confederate and agree together and with divers other persons to the grand jury unknown, to commit an offense against the United States of America, that is to say, to violate Section 3 of Title 1 of the Act of Congress approved June 15, A. D. 1917, entitled: 'An act to punish acts

of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States and for other purposes,' *by wilfully causing and attempting to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States* and to commit an offense against the United States of America, that is to say, to violate Section 3 of Title 1 of the Act aforesaid, *by wilfully obstructing the recruiting and enlistment service of the United States to the injury of the said service and to the injury of the United States,* when and while the United States of America was at war with the Imperial German Government, as aforesaid."

Section 3 of the said Act of June 15, 1917, makes three separate and distinct acts, violations of said section, to-wit: (1) Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies; (2) and whoever, when the United States is at war, shall *wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States,* (3) *or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service of the United States.*

In *United States* v. *Dembowski* (Sept. 19, 1918), 252 Fed. 894, the indictment alleged that the defendant did

> "wilfully and unlawfully make and convey *false reports and false statements* against the United States army and the United States navy, with intent to then and there interfere with the operations and success of the military and naval forces of the United States, and with intent then and there to promote the success of the enemies of the United States, and did then and there and thereby *cause* and *attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the said military and naval forces of the United States* by the members of such service, respectively. * * * and did then and there wilfully *obstruct the recruiting and enlistment of the service of the United States* to the injury of the United States," etc.

District Judge TUTTLE, in sustaining a demurrer and motion to quash said indictment, said:

> "IT SEEMS PLAIN THAT EACH OF THE ACTS THUS PROHIBITED IS SEPARATE AND DISTINCT IN ITS NATURE AND OBJECT, AND THAT THE COMMISSION OF EACH OF SUCH ACTS CONSTITUTES A DISTINCT AND SEPARATE OFFENSE. IN MY OPINION, THEREFORE, THEY CAN NOT BE JOINED IN ONE COUNT OF THE INDICTMENT, BUT, IF ALLEGED THEREIN, MUST BE SET FORTH IN DIFFERENT COUNTS."

Mr. Lindquist, during the oral arguments of the case at bar, read Judge Tuttle's opinion. Mr. Justice PITNEY thereupon inquired whether or not the Michigan case was a charge of conspiracy or the substantive offense. Upon Mr. Lindquist's answer that it was the substantive offense, Mr. Justice PITNEY inquired whether the same rule would apply in both cases, to

which Mr. Lindquist replied that he did not know, but knew of no reason why the constitutional rights of the defendant should not be protected in either case. Mr. Justice PITNEY thereupon asked Mr. Lindquist if the court had not held to the contrary in the 236 U. S., to which Mr. Lindquist replied that he had no knowledge of any such a ruling. Mr. Justice PITNEY, thereupon, examined the opinion in the 236 U. S., and announced that he found that the court did not so hold. The case referred to is that of *Joplin Mercantile Co.* v. *United States* (1915), 236 U. S. 531. The opinion in that case was delivered by Mr. Justice PITNEY. He said:

> "In the District Court of the United States for the Southwestern Division of the Western District of Missouri the petitioners, Joplin Mercantile Company and Joseph Filler, with others, were indicted under Sec. 37 of the Criminal Code * * * the charge being that at Joplin, within the jurisdiction of the court, the defendants did unlawfully, feloniously, etc., 'conspire together to commit an offense against the United States of America, to-wit: to unlawfully, knowingly and feloniously introduce and attempt to introduce malt, spiritous, vinous and other intoxicating liquors into the *Indian country*, which was formerly the Indian Territory and now is included in a portion of the State of Oklahoma, and into the City of Tulsa, Tulsa County, Oklahoma, which was formerly within and is now a part of what is known as the Indian country, and into that part of Oklahoma which lies within the Indian country."

So far as we have been able to find, no question about duplicity in the indictment was passed upon in that case.

This is the case upon which your honors base your opinion that the first count of the indictment is not duplicitous.

Your honors also cite the case of *The Buckeye Powder Company* v. *E. L. Du Pont de Nemours Powder Company*, 248 U. S. 55. The record shows that said cause was to be restored to the docket for reargument. What questions were raised in that case we do not know. Suffice to say, however, that we know of no law which would make the rules of pleadings in civil cases a criterion for criminal pleadings.

After the rendition of the Joplin Mercantile Company's case, supra, the United States Circuit Court of Appeals for the Eighth Circuit, in *Lewellen* v. *United States* (1915), 223 Fed. 18, held:

> "An indictment charging that the defendant carried intoxicating liquor *into the Indian country from without the Indian country* and *from without the State of Oklahoma* is *duplicitous*, since the offense of introducing liquor into the *Indian country*, as defined by Act Jan. 30, 1897, c. 109, 29 Stat. 506 (Comp. St. 1913, §4137), is a *different offense* from carrying liquor *into the Indian Territory from without the State of Oklahoma*, as defined by Act, March 1, 1895, c. 145, 28 Stat. 693, 697."

We respectfully re-submit that the first count is duplicitous.

THIRD.

**The first count is also insufficient and in violation of article six of amendments to the Constitution of the United States in that it does not inform the defendant of the nature and cause of accusation against him.**

As previously stated, Section 3 of the Act of June 15, 1917, creates *three* separate and distinct offenses.

There is no contention that this count even attempts to charge that the defendants did *wilfully make or convey any false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies.*

Mr. John Lord O'Brian, special assistant to the Attorney General for War Work, in the brief for the United States, page 17, says:

> * * * "Nor is it true, as stated on page 24 of the defendant's brief, that 'Section 3 does not prohibit the conveying of true reports or true statements but only those which are false.' The clauses of Section 3 upon which this prosecution was based make no provision whatever relative to the truth or falsity of any statements which may be used to cause insubordination in the military forces or to obstruct the recruiting and enlistment service."

Learned counsel would have us believe that while the first part of Section 3, supra, specifically prohibits the making of any false reports or false statements, that the latter part thereof would make it a criminal offense to tell the truth. Such a statement is absolutely ab-

surd. We were taught in childhood that the VIII Commandment provides:

> "*Thou shalt not bear false witness against thy neighbor!*" Mr. O'Brian would amend that Commandment so as to read: "Thou shalt not bear either true or false witness against thy neighbor."

The remaining part of the said count charges, in the language of said Section 3, that the defendants conspired to violate said law, by *wilfully causing and attempting to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States*, and also by *wilfully obstructing the recruiting and enlistment service of the United States to the injury of the said service and to the injury of the United States*, and that thereafter and pursuant to said unlawful and felonious conspiracy, confederation and agreement together, aforesaid, and to effect the object thereof, the said defendants did unlawfully, wilfully and feloniously prepare, print, publish, distribute and circulate, and cause to be prepared, printed, published, distributed and circulated in and by means of and as a part of said newspaper, certain reports, statements, communications and alleged news items therein set forth.

It will thus be seen that the said count simply follows the language of the second and third subdivision of said Section 3. Is that sufficient criminal pleadings? It is not.

In *United States* v. *Britton* (1883), 108 U. S.-199, this Honorable Court held that:

> *"In an indictment for a conspiracy under Sec. 5440, Rev. Stat., the conspiracy must be sufficiently charged; it cannot be aided by averments of acts done by one or more of the conspirators in furtherance of the object of the conspiracy."*

The Supreme Judicial Court of Massachusetts in *Com. v. Sheed et al.* (1851), 7 Cush. 514, held:

> *"An indictment for conspiracy to cheat and defraud, which does not set forth the means intended to be used, is insufficient; and it is not aided by averments of overt acts done in pursuance of the conspiracy."*

This case is cited with approval, in *United States* v. *Britton, supra.*

FOURTH.

**Neither of the second, third, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, twelfth or thirteenth counts, or either of them, are sufficient, and are in violation of article six of amendments to the Constitution of the United States in that they do not inform the defendant of the nature and cause of accusation against him.**

The second count charges, "that on or about the sixth day of July, A. D. 1917, while the United States was at war as aforesaid, with the Imperial German Government, one CARL GLEESER and one JACOB FROHWERK did unlawfully, willfully and feloniously at Kansas City, in Jackson County, Missouri, * * * *attempt to cause disloyalty, mutiny and refusal of duty in the military and naval forces of the United States*, in

this, that the said CARL GLEESER and the said JACOB FROHWERK did, then and there unlawfully, willfully and feloniously prepare, print, publish, distribute and circulate in and by means of and as a part of a certain newspaper known, designated and entitled 'MISSOURI STAATS ZEITUNG,' and in the issue thereof bearing date 'Kansas City, Mo., 6 July, 1917' certain *statements and certain reports, communications, articles and alleged news items*, the said newspaper then and there being a newspaper generally circulated throughout the city of Kansas City, Missouri, and throughout the State of Missouri, and throughout other parts of the United States of America; said statements, reports, communications, articles and alleged news items being in words and figures as follows, to-wit:

"COME LET US REASON TOGETHER."

(Here follows an article, and letter, bearing the signature of Joseph D. Shewalter).

The third, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, twelfth and thirteenth counts, in the same language, charge the publication of a different article, on a different date.

It is not alleged anywhere that the statements and reports were *false*, although section 3, supra, specifically prohibits any *false reports and false statements*. Surely your honors would not hold that the publication of *true reports and true statements* would be a crime, under any law.

In *United States* v. *Carll* (1882), 105 U. S. 611, this Honorable Court held what is required to constitute a good indictment, as follows:

> *"In an indictment upon a statute it is not sufficient to set forth the offense in the words of the statute, unless the words themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of the statutes on the like matter, enables the court to infer the intent of the legislature does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent"* (Citing *United States* v. *Cruikshank*, 92 U. S. 542; *United States* v. *Simmons*, 96 U. S. 360; *Com.* v. *Clifford*, 8 Cush. 215; *Com.* v. *Bean*, 11 Cush. 414; *Com.* v. *Bean*, 14 Gray, 52, and *Com.* v. *Filburn*, 119 Mass. 297).

Much space has been given in the opinion as to the contents of the articles published, but no reference whatever to the charging part of the indictment. It is hardly necessary to call Your Honors' attention to the fact that the articles themselves, whatever they may contain, cannot be considered for the purpose of determining the sufficiency of the indictment (*United States* v. *Britton*, *supra*).

Now, we respectfully call Your Honors' attention to the fact that while the first count charges a conspiracy, *"by wilfully causing and attempting to cause insubordination, disloyalty, mutiny and refusal of duty in the military and naval forces of the United States,"* and also

*"by wilfully obstructing the recruiting and enlistment service of the United States,"* that the second, third, fourth, fifth, sixth, eighth, ninth, tenth, eleventh, twelfth and thirteenth counts only charge *"attempting to cause disloyalty, mutiny and refusal of duty in the military and naval forces of the United States,"* in the language of said Section 3.

This honorable court, in *United States* v. *Cruikshank et al.*, 92 U. S. 557-58 (1875), adopted the form of pleading laid down in 1 Arch. Cr. Pr. & Pl. 291, as follows:

> "IT IS AN ELEMENTARY PRINCIPLE OF CRIMINAL PLEADING, THAT WHERE THE DEFINITION OF THE OFFENSE, WHETHER IT BE AT COMMON LAW OR BY STATUTE, 'INCLUDES GENERIC TERMS, IT IS NOT SUFFICIENT THAT THE INDICTMENT SHALL CHARGE THE OFFENSE IN THE SAME GENERIC TERMS AS IN THE DEFINITION, BUT IT MUST STATE THE SPECIES—IT MUST DESCEND TO PARTICULARS."

The United States Circuit Court of Appeals for the Ninth Circuit, in *Foster* v. *United States* (1918), 253 Fed. 481, in passing upon the sufficiency of an indictment under said section 3, held:

> "An indictment charging that defendants, in violation of the Espionage Act, conveyed false reports, with intent to interfere with the success of the military and naval forces of the United States, etc., but which did not specify the reports, or to whom they were made, but merely followed the

language of the statute, *held insufficient; the statute itself being general.*"

Your Honors say, "*It may be that all this might be said or written even in time of war in circumstances that would not make it a crime. We do not lose our right to condemn either measures or men because the Country is at war.*"

One of the slogans during the war with Germany was: "Stand by the President!" We most respectfully assert that if that slogan is adopted, Mr. Frohwerk has committed no crime.

On April 25, 1917, while the Espionage Act was under consideration by Congress, President Wilson wrote Mr. Arthur Brisbane, the following letter:

"THE WHITE HOUSE.

Washington, D. C., April 25, 1917.

ARTHUR BRISBANE,
New York Evening Journal New York American,
New York City.

My dear Mr. Brisbane:

I sincerely appreciate the frankness of your interesting letter of April with reference to the so-called Espionage bill now awaiting action by Congress.

I approve of this legislation, *but I need not assure you and those interested in it that whatever action the Congress may decide upon, so far as I am personally concerned I shall not expect or permit any part of this law to apply to me or any of my official acts or in any way to be used as a shield against criticism.*

*I can imagine no greater disservice to the country than to establish a system of censorship that would deny to the people of a free Republic like our*

*own their indisputable right to criticise their own public officials. While exercising the great powers of the office I hold I would regret, in a crisis like the one through which we are now passing, to lose the benefit of patriotic and intelligent criticism.*

In these trying times one can feel certain only of his motives, which he must strive to purge of selfishness of every kind and wait with patience for the judgment of a calmer day to vindicate the wisdom of the course he has tried conscientiously to follow:

Thanking you for having written me,

Cordially and sincerely yours,

WOODROW WILSON."

At the time that our good President wrote the foregoing letter, the Espionage Act was pending in Congress. It was not approved until June 15, 1917. The President approved the same, well knowing what construction he had placed thereon, in his letter to Mr. Brisbane. The defendant and the public in general also knew it.

The Department of Justice, however, in direct defiance of the position taken by the President, has placed an entirely different construction upon said Act, and sent a number of people to the penitentiaries for violating the same.

It is a matter of common knowledge at Washington that the President, on the evening of Sunday, March 2nd, 1919, before returning to France, at the request of Mr. T. W. Gregory, the then Attorney General, pardoned a number of persons convicted of violating said

Act. Mr. Lindquist was in Washington at the time. The President would be absolutely insincere, should he permit any man to serve a sentence in a penitentiary, for having relied upon his interpretation of said Act, and thereby violated the law. The President's letter is printed on pages 43 and 44 of our original brief, but no reference thereto was made in the opinion of this court.

The President and the Secretary of State are now in France, to establish peace on earth. *"Blessed are the peacemakers; for they shall be called the children of God."* (St. Matthew 5-9). They also seek to establish a League of Nations, to abolish wars. The Secretary of War, at the same time, is urging *universal military* training, and a *large standing army.* The Secretary of the Navy, at the same time, is urging a *large navy. "A house divided against itself cannot stand."* (Lincoln.) These positions cannot both be right.

We respectfully submit that the demurrer to the indictment should have been sustained.

FOURTH.

**Necessity of Allegation of Criminal Intent.**

There is no allegation in either count of the indictment that the acts were done with *criminal intent.* We respectfully submit that without a criminal intent, there can be no violation of the law.

The opinion of this Honorable Court fails to make distinction between the intent against which the statute

is directed, as stated in the brief for the Government (p. 16), to-wit: "To cause disloyalty and refusal of duty in the military forces," and that intent which counsel for the Government (pp. 15 and 16) state the twelve items and articles in the newspaper complained of exhibited, to-wit: "The items and articles in the newspaper were such as to create in the reader opposition to the *war and to war service.*"

Admitting the last stated intent to be the intent, or even the effect, of said newspaper items and articles, this does not constitute, nor even imply, the intent to cause disloyalty to the government or refusal of duty in the military and naval forces of the United States.

This distinction between two states of mind constitute the very crux of all the controversy over freedom of press and speech in time of war. It may be difficult to determine when the one state of mind ends and the other begins, but we maintain that an unbiased examination of all the items and articles complained of clearly show that they are addressed to the general public of the country and not to the particular classes of citizens subject to military and naval service. Where, in any of the articles, direct action is advised, the appeal is to the "electors" and action advised is by votes at the coming election.

Whenever action against any law is advised it is by repeal, with the injunction that, in the meantime, it must be obeyed. What could be plainer than the statement contained in the fifth count of the indictment, to-wit:

"BUT UNTIL PROPERLY CONSTITUTED COURTS OF THE LAND SAY SO, THE LAW MAY BE CRITICISED, BUT IT MUST BE OBEYED."

Also:

"HAPPILY, IN OUR COUNTRY WE HAVE EVERY AGENCY PROVIDED FOR US BY THE FRAMERS OF THE CONSTITUTION TO RIGHT A WRONG WITHOUT HAVING TO TAKE RECOURSE TO FORCE. IN THE DRAFT LAW, AS WELL AS IN ALL OTHERS, IF WE FEEL AGGRIEVED, WE HAVE THE COURTS TO WHICH WE CAN GO FOR PROTECTION. SHOULD THESE FAIL US, WE HAVE THEN THE RIGHT TO PETITION CONGRESS TO REPEAL THE LAW, AND SHOULD WE AGAIN FAIL HERE, THEN WE CAN OURSELVES RIGHT THE WRONG AT THE NEXT ELECTION."

We respectfully call attention to the fact that an election was held last November, and that it resulted in electing a Republican Congress.

In making an appeal to Congress to repeal the law, the defendant acted within the express provisions of Article 1 of Amendments to the Constitution of the United States which provides that *the right of the people peaceably to assemble and to petition the government for the redress of grievances shall never be abridged.*

The opinion limits the grounds for conviction to conspiracy to obstruct recruiting by words of persuasion, and says that the Government argues that on the record the question is narrowed simply to the power of Congress to punish such a conspiracy to obstruct.

This honorable court further, in the opinion, takes it in favor of the defendant that the publications set forth as overt acts were the *only means*, and when coupled with the joint activity in producing them, the *only evidence* of the conspiracy alleged.

On this basis, the opinion then takes up the twelve newspaper articles published, acknowledged to have been produced by at least three different writers, and culling out a phrase or sentence here and there and piecing them together in continuous narrative and comment for about a printed page of the opinion, concludes that all this might be said or written even in time of war in circumstances that would not make it a crime. The opinion then distinctly recognizes the right to condemn either measures or men because the country is at war, and further says that it does not appear that there was any special effort in these twelve articles to reach men who were subject to the draft; and yet, on the theory that the record does not disprove the defendant's intent to cause resistance or obstruction to recruiting, affirms the judgment and sentence of ten years upon each count.

In other words the burden of disproving the criminal nature of the intent inferred in the newspaper articles is put upon the defendant, and the statements in the articles themselves, which show only opposition to men and measures and appeal for action against them through legal methods, are completely ignored.

## FIFTH.

### Freedom of Speech and of the Press.

Article 1 of Amendments to the Constitution of the United States, in the plainest language, places the following limitations upon the power of Congress, to-wit:

> "RELIGIOUS LIBERTY—FREEDOM OF SPEECH—RIGHT OF PETITION. Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; *or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.*"

Everybody concedes that Congress can not pass any law to establish religion in the United States. Suppose, however, that Congress, in defiance of said prohibition, shall pass a law, and the same would be approved by the President, providing that the Roman Catholic Church should be the only established church in the United States, and that to worship in any other church would be a crime. No court would attempt to uphold such a law. On the other hand, suppose that a law should be passed providing that the Lutheran, Presbyterian, Baptist, Methodist, Christian or Episcopal Church should be the only established church in the United States, and that to worship in any other church should be a crime. No court would attempt to uphold such a law.

However, the same Constitutional Amendment, specifically prohibits Congress from making any law * * * *Abridging the freedom of Speech or of the Press.*

It is a matter within the exclusive police power of the states.

Article X of Amendments to the Constitution of the United States further provides:

> "POWERS RESERVED TO THE STATE OR PEOPLE.—*The powers not delegated to the United States by the Constitution, nor prohibited* by it to the States, are reserved to the States, respectively, or to the people."

Can there be any question but that the First Amendment to the Constitution is an absolute prohibition of the Congress to make any law abridging the freedom of speech or of the press? Surely not. Nevertheless, Mr. Frohwerk has been sentenced to serve ten years in the penitentiary. We should be very much indebted to Your Honors if you would also kindly explain how *an appeal to Congress* to repeal any law might be made (as specifically permitted by the said First Amendment), if we are neither *allowed to speak or write our grievances.*

In *United States* v. *Doremus*, decided March 3, 1919, Mr. Chief Justice WHITE, with whom concurred Mr. Justice McKENNA, Mr. Justice VAN DEVANTER and Mr. Justice McREYNOLDS, held that Section 2 of the Harrison Narcotic Drug Act, insofar as it seeks to limit the sales of narcotics to certain purchasers, is beyond the constitutional power of Congress to enact because to such extent the statute is a mere attempt by Congress to exert a power not delegated, that is, the reserved police power of the States.

Upon the same theory, we respectfully contend that the Espionage Act is unconstitutional, null and void.

SIXTH.

**The demurrer to the evidence should have been sustained.**

At the close of the Government's evidence, the defendant interposed a demurrer to such evidence, and asked that the court give a peremptory instruction to find the defendant not guilty, which demurrer and request were overruled and denied, to which action of the court the defendant then and there duly excepted (Print 87).

Mr. Justice HOLMES says:

> "It does not appear that there was any special effort to reach men who were subject to the draft; and if the evidence should show that the defendant was a poor man, turning out copy for Gleeser, his employer, at less than a day laborer's pay, for Gleeser to use or reject as he saw fit, in a newspaper of small circulation, there would be a natural inclination to test every question of law to be found in the record very thoroughly before upholding the very severe penalty imposed."

Without any fear of contradiction, we here again assert that but for the unfortunate differences of opinion as to what constitutes a bill of exceptions, between Judge YOUMANS and Mr. Shewalter, and the arbitrary refusal of Judge YOUMANS to quote a single sentence of evidence introduced, learned counsel for the Government would have been compelled to concede that the evidence did not show that this defendant was either the owner, publisher or distributor of said newspaper, or had nothing whatever to do with the management and distri-

bution thereof, but received ten dollars per week from Mr. GLEESER for his editorial writings, which were accepted, corrected or refused by Mr. GLEESER, as he saw fit.

SEVENTH.

**Were the defendants justified in relying upon Judge Shewalter's opinion as to the law?**

Neither of the defendants are lawyers. They are not versed in the law.

Judge Shewalter wrote and handed in for publication the two articles set forth in the second and eleventh counts of the indictment. Mr. Frohwerk had nothing whatever to do with the writing and publishing of said articles. Neither was he the owner, editor or publisher of the said newspaper. Must he serve ten years in the penitentiary, for something which he did not do? *"It is far better that ten guilty men should escape, than that one innocent man should suffer."*

The article set forth in the fifth count was written and sent in for publication by Mr. G. Polk Cline, an attorney of Larned, Kansas. The defendant had nothing whatever to do with the writing or publishing of said article. Nevertheless, he has been sentenced to serve ten years, for writing and publishing the same.

Come, let us reason together for a few minutes! Judge Shewalter graduated from the law department of the University of Virginia in 1868, and has been actively engaged in the practice of law ever since. He has made the Constitution of the United States a special study. Mr. Cline is a prominent attorney in Western

Kansas. No person would contend that either Judge Shewalter or Mr. Cline would have written those articles, and caused Mr. Gleeser to publish the same, had they believed that the publication thereof would cause any person to serve a term in the penitentiary. Undoubtedly Judge Shewalter passed upon the other articles, contained in the indictment, and held that they could be legally published in said newspaper. Still, Mr. Gleeser is now serving a sentence of five years, and Mr. Frohwerk must, unless this petition be sustained, serve a sentence of ten years, for taking the advice of Judge Shewalter as to what the law is. Can Your Honors conceive of anything more unjust?

The various states in the Union have prescribed certain rules and educational qualifications for admission to the bar. Rule No. 2 of this Honorable Court also prescribes these additional qualifications, to-wit:

> "It shall be requisite to the admission of attorneys or counsellors to practice in this court, that they shall have been such for three years past in the highest courts of the states to which they respectively belong, and that their private and professional characters shall appear to be fair."

Your Honors will take judicial notice that Joseph D. Shewalter is *now* a member of the bar of this court. Hence, the license issued by the clerk of this court clothes him with the honor of being a member of the bar, and an officer of this court, and the license is evidence that he possesses the required qualifications. In addition thereto, Your Honors have listened to the able argument of Judge Shewalter, as to freedom of speech and of the

press, and read his brief in support thereof. Can Your Honors say that a man who adopts Judge Shewalter's opinion is a criminal?

This Honorable Court has wisely held that a court has jurisdiction to decide a case wrong as well as right. The courts are not infallible any more than the lawyers are. We do not become clothed with the wisdom of Solomon, either upon being admitted to the bar or upon our elevation to the bench.

Furthermore, twelve good and lawful men (all laymen) composed the jury. They passed upon the various articles, some of them written by eminent lawyers, and pronounced them to be of such a nature that their writing and publication, constituted offenses against the laws of the United States. Are laymen competent to judge the ability of lawyers, or to interpret the laws?

If a client has not the right to rely upon the advice of his attorney, as to what the law is, what in the name of common sense can he rely on? If the attorney's advice is not a sufficient guarantee that will justify the client in acting thereon, without subjecting himself to penal servitude, it follows that the legal profession has become a farce and should be abolished.

We earnestly and sincerely urge upon Your Honors to grant this petition for a rehearing, and to sustain the motion for leave to file the petition for a writ of mandamus, to compel Judge YOUMANS to prepare, settle, seal and file a proper and legal bill of exceptions.

Respectfully submitted,

FRANS E. LINDQUIST,
*Attorney for Plaintiff in Error.*

GEO. N. ELLIOTT,
*Of Counsel.*

## Certificate of Attorney.

*United States of America, Western District of Missouri, ss.*

I, FRANS E. LINDQUIST, a duly admitted, licensed and practicing attorney and counselor of the Supreme Court of the United States, and attorney for the plaintiff in error in the above entitled cause, do hereby certify that this petition for a rehearing is not made for vexation or delay, but in sincerity and truth for the purpose of obtaining a rehearing herein, and a writ of mandamus as prayed for, and that I verily believe that this petition should be sustained.

Dated at Kansas City, Missouri, this 31st day of March, 1919.

FRANS E. LINDQUIST,
*Attorney for Plaintiff in Error.*